OPINION OF ADVOCATE GENERAL SAGGIO

delivered on 23 September 1999 *

1. In this case the Bundesgerichtshof (Germany) has requested a preliminary ruling on three questions concerning the interpretation of Article 27, point 1, of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland [1] (hereinafter 'the Convention'), and Article II of the Protocol annexed thereto (hereinafter 'the Protocol').

In essence the questions concern the interpretation of the expression 'public policy in the State in which recognition is sought' in Article 27, point 1. The Court is asked to rule, first, on whether a court of a Contracting State may refuse to recognise, on the ground that it is contrary to public policy, a judgment given by a court of another Contracting State on a civil claim introduced in criminal proceedings, where the latter court based its jurisdiction solely on the victim's nationality and, second, on whether the first court may refuse to recognise the foreign judgment where the court of the State of origin refused to allow the accused to defend himself, on the basis of national rules of criminal procedure which preclude a defendant who does not enter an appearance from presenting his defence.

The national proceedings and the questions

2. It appears from the order for reference that on 9 July 1982 Mr Krombach, a doctor of German nationality, administered an injection of Cobalt-Ferrlecit to a young girl, Kalinka Bamberski, a French national who was staying at his home in Lindau (Germany), and that she died in Lindau on 10 July 1982. As a result, the German authorities instituted criminal proceedings against Mr Krombach for manslaughter. The proceedings which lasted several years, were discontinued for lack of evidence.

Mr André Bamberski, Kalinka's father, lodged a complaint with the French authorities against Mr Krombach, whom he held responsible for his daughter's death. In 1993 Mr Krombach was committed for trial before the Cour d'Assises, Paris (Paris Assises), on a charge of wilful murder. Mr Bamberski introduced a civil claim in the proceedings. On 5 June 1993 a summons to appear before that court was served on Mr Krombach at his home in Lindau, together with the civil claim for

* Original language: Italian.

1 — OJ 1978 L 304, p. 1.

damages associated with the criminal proceedings. The Court d'Assises, Paris, subsequently issued a warrant for his arrest to compel him to appear at the trial. However, he did not appear in person, but was represented by a French lawyer and a German lawyer. The Cour d'Assises found that he had failed to appear in person and consequently refused to allow his lawyers to represent him and ruled that the written statements of defence presented by them were inadmissible.

3. By judgment of 9 March 1995, the Cour d'Assises sentenced Mr Krombach *in absentia* to 15 years' imprisonment for the manslaughter of Miss Bamberski. By judgment of 13 March 1995 the French court also ordered Mr Krombach to pay Mr Bamberski a total of FRF 350 000, FRF 250 000 in damages and FRF 100 000 in reimbursement of court costs and defence costs.

Mr Krombach appealed on a point of law against both judgments. The Cour de Cassation ruled the appeal inadmissible as it had been lodged by a person who did not enter an appearance.

Mr Kromback also brought an action against the French Republic before the European Commission of Human Rights on the ground that his rights of defence had been violated by the decision preventing him from being represented in the proceedings. The European Court of Human Rights does not appear to have ruled on this complaint.

4. Mr Bamberski applied to the appropriate German court, the Landgericht (Regional Court), Kempten, for an order for the enforcement of the judgment awarding damages against Mr Krombach. The application was granted. Mr Krombach appealed against that decision to the Oberlandesgericht (Higher Regional Court), which dismissed the appeal. He then lodged an appeal on a point of law with the Bundesgerichtshof (Federal Court of Justice).

5. The Bundesgerichtshof found that the case raised doubts concerning the interpretation of provisions of the Convention and referred the following questions to the Court of Justice for a preliminary ruling pursuant to Article 3 of the Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters,[2] and pursuant to Article 2 of the German Law of 7 August 1972:

'(1) May the provisions on jurisdiction form part of public policy within the

2 — OJ 1978 L 304, p. 97.

meaning of Article 27, point 1, of the Brussels Convention where the State of origin has based its jurisdiction as against a person domiciled in another Contracting State (first paragraph of Article 2 of the Brussels Convention) solely on the nationality of the injured party (as in the second paragraph of Article 3 of the Brussels Convention in relation to France)?

If Question 1 is answered in the negative:

(2) May the Court of the State in which enforcement is sought (first paragraph of Article 31 of the Brussels Convention) take into account under public policy within the meaning of Article 27, point 1, of the Brussels Convention that the criminal court of the State of origin did not allow the debtor to be defended by a lawyer in a civil-law procedure for damages instituted within the criminal proceedings (Article II of the Protocol of 27 September 1968 on the interpretation of the Brussels Convention) because he, a resident of another Contracting State, was charged with an *intentional* offence and did not appear in person?

If Question 2 is also answered in the negative:

(3) May the Court of the State in which enforcement is sought take into account under public policy within the meaning of Article 27, point 1, of the Brussels Convention that the court of the State of origin based its jurisdiction solely on the nationality of the injured party (see Question 1 above) and *additionally* prevented the defendant from being legally represented (see Question 2 above)?'

The legal context

The relevant provisions of the Brussels Convention

6. The first paragraph of Article 1 provides that the Convention 'shall apply in civil and commercial matters whatever the nature of the court or tribunal'. The Convention sets out rules for determining the jurisdiction of the courts of the Contracting States (Title II) and provisions governing the recognition and enforcement abroad of judgments of those courts (Title III).

7. The basic principle regarding jurisdiction, set out in the first paragraph of Article 2, is that 'persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State'.

The Convention expressly states that the national rules of jurisdiction listed in the second paragraph of Article 3 are not applicable as against persons domiciled in another Contracting State. In the case of France, the provisions in question are Articles 14 and 15 of the Civil Code.

The Convention then goes on to lay down rules of jurisdiction for specific types of action. As regards civil claims for damages introduced in criminal proceedings, the Convention provides that jurisdiction lies with 'the court seised of those proceedings, to the extent that that court has jurisdiction under its own law to entertain civil proceedings' (Article 5, point 4).

8. A judgment given in a Contracting State is to be recognised in the other Contracting States 'without any special procedure being required' (first paragraph of Article 26). Recognition may be refused on any of the grounds expressly laid down in Articles 27 and 28 of the Convention.

In particular, Article 27, point 1, provides that 'a judgment shall not be recognised:

1. if such recognition is contrary to public policy in the State in which recognition is sought'.

Article 28 provides that a judgment is not to be recognised 'if it conflicts with the provisions of Section 3, 4 or 5 of Title II, or in a case provided for in Article 59' (first paragraph). In examining those grounds of jurisdiction, 'the court or authority applied to shall be bound by the findings of fact on which the court of the State in which the judgment was given based its jurisdiction' (second paragraph). Subject to the provisions of the first paragraph, 'the jurisdiction of the court of the State in which the judgment was given may not be reviewed' and, in particular, 'the test of public policy referred to in Article 27, point 1, may not be applied to the rules relating to jurisdiction' (third and last paragraph).

Under Article 31, 'a judgment given in a Contracting State and enforceable in that State shall be enforced in another Contracting State when, on the application of any interested party, an order for its enforcement has been issued there'.

Paragraph 2 of Article 34 provides that 'the application may be refused only for one of the reasons specified in Articles 27 and 28'.

9. Article II of the Protocol provides that 'without prejudice to any more favourable provisions of national laws, persons domiciled in a Contracting State who are being prosecuted in the criminal courts of another Contracting State of which they are not nationals for an offence which was not intentionally committed may be defended by persons qualified to do so, even if they do not appear in person' (first paragraph) and that 'however, the court seised of the matter may order appearance in person; in the case of failure to appear, a judgment given in the civil action without the person concerned having had the opportunity to arrange for his defence need not be recognised or enforced in the other Contracting States' (second paragraph).

The relevant national provisions

10. The relevant provisions in this case are the provision of French law under which the court found that it had jurisdiction to try Mr Krombach for the offence with which he was charged and consequently to adjudicate on the civil claim introduced in the criminal proceedings, and the other provision of French law under which the same court refused to hear the defendant's defence on the ground of his failure to appear in person.

With regard to the first provision, it appears from the order for reference that Article 689-1 of the Code of Criminal Procedure, in the version in force at the material time,[3] provided that a foreign national could be prosecuted before the French courts for a crime committed against a French national outside France. This provision of the Code of Criminal Procedure is similar to Articles 14 and 15 of the Civil Code. In particular, Article 14 provides that 'l'étranger, même non résidant en France, pourra être cité devant les tribunaux français, pour l'exécution des obligations par lui contractées en France avec un Français; il pourra être traduit devant les tribunaux de France, pour les obligations par lui contractées en pays étranger envers des Français' [a foreign national, even if not resident in France, may be summoned before the French courts for the fulfilment of obligations contracted by him in France with a French national; he may be sued before the French courts for obligations to French nationals contracted by him in foreign countries].[4] As already mentioned, under the second paragraph of Article 3 of the Convention,such provisions

3 — Article 689-1 of the French Code of Criminal Procedure, in the version in force up to 1 March 1994, provided that: 'Tout étranger qui, hors du territoire de la République, s'est rendu coupable d'un crime, soit comme auteur, soit comme complice, peut être poursuivi et jugé d'après les dispositions des lois françaises, lorsque la victime de ce crime est de nationalité française' [a foreign national who, outside the territory of the Republic, commits a crime, either as the perpetrator or as an accomplice, may be prosecuted and tried in accordance with the provisions of French law where the victim of the offence is a French national]. In the version now in force, this article is worded as follows: 'En application des conventions internationales visées aux articles suivants [articles 689-2 à 689-7], peut être poursuivie et jugée par les juridictions françaises, si elle se trouve en France, toute personne qui s'est rendue coupable hors du territoire de la République de l'une des infractions énumérées par ces articles' [pursuant to the international agreements referred to in the following articles ..., a person who commits any of the offences listed in those articles outside the territory of the Republic may, if that person is in France, be prosecuted and tried by the French courts]. Article 689 at present in force recognises the jurisdiction of the French courts for offences committed outside France 'conformément aux dispositions du livre Ier du code pénal' [in accordance with the provisions of Book I of the Criminal Code], Article 113-7 of which provides that French criminal law applies also to offences committed outside France where the victim was a French national at the time when the offence was committed.

4 — Under Article 15, 'un Français pourra être traduit devant un tribunal de France, pour des obligations par lui contractées en pays étranger, même avec un étranger' [a French national may be sued before a French court for obligations contracted by him in a foreign country, even with a foreign national].

may not be applied as against persons domiciled in a Contracting State.

With regard to the rules on procedure *in absentia*, Article 630 of the Code of Criminal Procedure provides that an accused who fails to appear in person may not be represented by counsel. [5]

Substance

The first question

11. With the first question, the referring court asks whether a court of a Contracting State may refuse to recognise, as contrary to its public policy (by virtue of Article 27, point 1, of the Convention), a judgment given by a court of another Contracting State on a civil claim introduced in criminal proceedings, where the jurisdiction of the second court is based solely on the victim's nationality (Article 689-1 of the French Code of Criminal Procedure).

In essence, the German court is asking whether it may be regarded as contrary to the public policy of the State in question to recognise or enforce a foreign judgment, given by a French court which, first, contrary to the provision contained in Article 2 of the Convention, found that it had jurisdiction, solely on the basis of the victim's nationality, to entertain an offence committed abroad by a person resident abroad and, second, applied a rule of jurisdiction in criminal matters which has the same effect as that relating to civil matters which (under the second paragraph of Article 3 of the Convention) cannot be applied as against a national of a Contracting state.

12. The problem arising in this case is therefore whether the concept of public policy in Article 27, point 1, covers the rules of jurisdiction of the State in which recognition or enforcement is sought.

13. The referring court observes in this connection that a provision such as that of the French Code of Criminal Procedure which, 'merely because the victim was a French national, requires a person domiciled in Germany to face proceedings for damages in France for an offence alleged to have been committed in Germany' is contrary to German public policy. There is, it claims, no equivalent provision in German law in favour of German nationals. The German court adds that recognition in German law of a judgment given by a court on the basis of such a rule of jurisdiction would lead to unequal treatment to the disadvantage of German nationals, who cannot bring an action before a German court when offences have been committed against them abroad. Such discrimination, it claims, is contrary to Article 3(1) of the Basic Law.

5 — Under Article 630 of the Code of Criminal Procedure, 'aucun avocat, aucun avoué ne peut se présenter pour l'accusé contumax' [no lawyer may appear on behalf of a defendant who fails to appear in person].

14. It is necessary to refer to Article 28 of the Convention in order to determine whether the differences between the rules of jurisdiction of the State in which judgment was given and those of the State in which recognition or enforcement is sought are contrary to public policy within the meaning of Article 27, point 1.

Article 28 provides that a judgment is not to be recognised 'if it conflicts with the provisions of Section 3, 4 or 5 of Title II or in a case provided for in Article 59' (first paragraph). In examining the grounds of jurisdiction, 'the court or authority applied to shall be bound by the findings of fact on which the court of the State in which the judgment was given based its jurisdiction' (second paragraph). Subject to those provisions, 'the jurisdiction of the court of the State in which the judgment was given may not be reviewed' and, in particular, 'the test of public policy referred to in Article 27, point 1, may not be applied to the rules relating to jurisdiction' (third and last paragraphs).

The provision is clear: a court may not refuse to recognise a judgment on the ground that the criteria for conferring jurisdiction on a foreign court differ from those laid down in national law; not only that, it may not even review those criteria, save only in relation to a possible breach of the provisions of the Convention concerning insurance, consumer contracts or so-called 'exclusive' jurisdictions (sections 3, 4 and 5 of Title II) or in the specific case of Article 59.[6] Those provisions contain mandatory rules for determining special and exclusive jurisdiction of courts of the Contracting States. In particular, with regard to the present question, any review of compliance with the general rule of jurisdiction contained in Article 2 and with the prohibition on applying the national rules of exorbitant jurisdiction referred to in the second paragraph of Article 3 of the Convention is excluded.

Furthermore, the last paragraph of Article 28 expressly precludes any differences between the rules of jurisdiction of the State in which the judgment was given and those of the State where recognition or enforcement is sought from being considered contrary to the public policy of the latter State.

15. The Jenard Report on the Convention contains the following comments on Article 28:[7]

'The very strict rules of jurisdiction laid down in Title II, and the safeguards

6 — Article 59 provides that 'this Convention shall not prevent a Contracting State from assuming, in a convention on the recognition and enforcement of judgments, an obligation towards a third State not to recognise judgments given in other Contracting States against defendants domiciled or habitually resident in the third State where, in cases provided for in Article 4, the judgment could only be founded on a ground of jurisdiction specified in the second paragraph of Article 3'. It should be mentioned that the transitional provision contained in the second paragraph of Article 54 of the Convention also allows for the possibility of review of its own rules of jurisdiction, in stating that 'judgments given after the date of entry into force of this Convention in proceedings instituted before that date shall be recognised and enforced in accordance with the provisions of Title III if jurisdiction was founded upon rules which accorded with those provided for either in Title II of this Convention or in a convention concluded between the State of origin and the State addressed which was in force when the proceedings were instituted'.

7 — OJ 1979 C 59, p. 1, in particular p. 46.

granted in Article 20 to defendants who do not enter an appearance, make it possible to dispense with any review, by the court in which recognition or enforcement is sought, of the jurisdiction of the court in which the original judgment was given.

The absence of any review of the substance of the case implies complete confidence in the court of the State in which judgment was given; it is similarly to be assumed that that court correctly applied the rules of jurisdiction of the Convention. The absence of any review as to whether the court in which the judgment was given had jurisdiction avoids the possibility that an alleged failure to comply with those rules might again be raised as an issue at the enforcement stage ...

The last paragraph of Article 28 specifies that the rules of jurisdiction are not matters of public policy within the meaning of Article 27; in other words, public policy is not to be used as a means of justifying a review of the jurisdiction of the court of origin. This again reflects the Committee's desire to limit so far as possible the concept of public policy.'

The Jenard Report also comments, with regard to the concept of public policy in Article 27, point 1, that 'public policy is not to be invoked as a ground for refusing to recognise a judgment given by a court of a Contracting State which has based its jurisdiction over a defendant domiciled outside the Community on a provision of its internal law, such as the provisions listed in the second paragraph of Article 3 (Article 14 of the French Civil Code, etc.)'.

16. These comments could be taken to imply that recognition of a judgment may be considered to be contrary to public policy if the court giving the judgment based its jurisdiction over persons domiciled in the Community on a provision of its internal law which is not applicable as against them under the second paragraph of Article 3 of the Convention. Such an interpretation of Article 28 would have to be understood as meaning that that article includes in any case among the exceptions to the prohibition on any review of national rules of jurisdiction, the rules on breach of the general rules of jurisdiction laid down in Articles 2 and 3 of the Convention.

On the contrary, it seems to me that the wording of that provision suggests that the general principle underlying it is that any review of the rules of jurisdiction of the court that gave the judgment is prohibited in order to facilitate so far as possible the free movement of judgments. It follows that the exceptions to this rule (indicated in particular in the first paragraph of Article 28) must be interpreted restrictively and cannot therefore include cases which are not expressly provided for in the Convention. This conclusion also applies in extreme cases where the general rules of

jurisdiction contained in Section 1 of Title II of the Convention have been wrongly applied in the judgment. If it were accepted that the court of the State where enforcement or recognition is sought can review the rules of jurisdiction applied by the court of the applicant State with a view to safeguarding public policy, this would render the general prohibition in the last paragraph of Article 28 void of meaning.

17. It follows from the foregoing considerations that, in matters of recognition and enforcement, a court of a Contracting State cannot regard recognition of a foreign judgment as contrary to the public policy of that State on the ground that a court of another Contracting State based its jurisdiction on a rule different from those of the State in which recognition or enforcement is sought. This applies even where jurisdiction was based on a rule similar to Articles 14 and 15 of the French Civil Code. Although it is true that the second paragraph of Article 3 prohibits the application of those provisions in proceedings as against persons domiciled in a Contracting State, Article 3 is not one of the exceptions to the general rule which precludes any review of compliance with the said provisions by the court which gave the judgment, the reason being that Article 28 refers only to exceptions involving a conflict with Articles 7 to 16 of Title II of the Convention.

A fortiori the possibility of regarding recognition of a civil judgment, like that in the main proceedings, given by a criminal court which based its jurisdiction on rules of the Code of Criminal Procedure similar to Articles 14 and 15 of the Civil Code, as contrary to public policy must in my view also be precluded.

18. Furthermore, in the present case the French criminal court derived its jurisdiction to hear the claim for damages from its jurisdiction with regard to the criminal proceedings. Therefore it correctly applied Article 5, point 4, of the Convention. Consequently, apart from the foregoing discussion of whether the German court may consider that there is a conflict with its public policy, the French court did not contravene the provisions of the Convention concerning jurisdiction in this respect either.

19. In the light of all these considerations, I consider that the reply to the first question should be that, under Article 28 of the Convention, the provisions on jurisdiction do not form part of public policy within the meaning of Article 27, point 1, of the Convention and therefore a court of a Contracting State cannot regard as contrary to the rules of public policy of that State the recognition — and therefore the enforcement — of a judgment where the court of the State of origin gave judgment on a civil claim in criminal proceedings against a person domiciled abroad and based its jurisdiction solely on the victim's nationality.

The second question

20. With the second question, the referring court is asking whether the enforcement of a judgment given in criminal proceedings where the defendant's representatives were not allowed to present a defence on the ground that he did not appear in person may be regarded as contrary to national public policy within the meaning of Article 27, point 1, of the Convention (to which the second paragraph of Article 34 refers), and whether Article II of the Protocol concerning the right of defence of persons prosecuted for an unintentional offence who do not appear in person is relevant in that connection.

21. The national court points out that the Cour d'Assises, Paris, refused to hear Mr Krombach's lawyers on the basis of the first paragraph of Article 630-1 of the French Code of Criminal Procedure, which provides that no defence counsel may appear on behalf of a defendant who does not enter an appearance. The Cour d'Assises found the accused guilty without considering his defence and fixed the compensation for non-material damage solely on the basis of the claims of the plaintiff in the civil proceedings, Mr Bamberski.

According to the referring court, the French rules of procedure which do not allow a defence on behalf of an accused who does not appear in person are contrary to the principles governing proceedings *in absentia* in German law. In the German legal system, the defence of an absent defendant is a fundamental right, a form of the more general right of defence. By virtue of this principle, a party to a civil action who fails to appear in court can always be represented by a lawyer, which means that he is no longer in default. Similarly, in criminal proceedings a defendant who fails to appear can always instruct defence counsel. In certain exceptional cases, the court must appoint defence counsel of its own motion. An absent defendant's right to be represented by counsel is also provided for in the case of a civil claim for damages brought in criminal proceedings, because such civil actions are governed by the Code of Criminal Procedure.

22. In my opinion, there is no doubt that the two national systems in the present case differ and that the difference relates to the rights of defence of the accused or defendant. The recognition by the referring court of the French judgment against Mr Krombach would accordingly be contrary to the German rules on the rights of defence and therefore a breach of a fundamental right.

The question in the present case is whether such a difference may justify a refusal to enforce the judgment (under Article 27 in conjunction with Article 34 of the Convention) on the ground that enforcement would be contrary to public policy in German law and whether in any case Article II of the Protocol applies in this case.

— The concept of public policy of the State in which recognition or enforcement is sought

23. Like the first question, the second turns on the interpretation of 'public policy in the State in which recognition is sought' within the meaning of Article 27, point 1, of the Convention, that is to say, when the ground for refusing recognition of a foreign judgment is that the operative part of the judgment is at variance with the public policy of the legal system in which the judgment is to take effect. Unlike the first question — which concerns conflict between the rules of jurisdiction of the State of origin and those of the State in which recognition or enforcement is sought — the second question relates to the relevance (in relation to such a ground of refusal) of differences between the procedural rules on the exercise of his rights of defence by a defendant who fails to appear in person. In other words, the referring court wishes to know whether an application for the enforcement of a judgment given in criminal proceedings can be refused on the ground that the defendant was not allowed to be represented by counsel.

24. This question involves the concept of public policy itself referred to in Article 27, point 1, of the Convention. As the Convention refers expressly to the *national* public policy of the State in which recognition is sought, it is necessary first of all to determine how far the Community judicature may interpret such a concept. In my opinion, a request for a preliminary ruling by the Court of Justice pursuant to the Protocol on the interpretation of the Convention may not — subject to what I have just said about the possibility of regarding rules of jurisdiction as part of public policy, a possibility expressly precluded by Article 28 of the Convention — be aimed at identifying rules which must be regarded as principles of international public policy of the State, that is to say, fundamental principles governing the functioning of the judicial bodies of its legal system. Breach of these principles may disturb the overall harmony of that system. [8] Generally speaking, it is not for the Community judicature, but for the national court, to identify the internal provisions which have the force of principles of 'public policy' in the national legal system. [9] I concur with the Commission's view that the Community judicature is entitled to make such an assessment only where the public policy rule of the State in which recognition or enforcement is sought can be traced to a source of Community law because, in that case, the question relates in essence to a provision of Community law.

25. The question referred by the national court is concerned with the conflict between national rules of procedure and a fundamental principle enshrined in the law of the State in which enforcement is sought. Therefore the question is not aimed at

8 — See the opinion delivered on 22 June 1999 in Case C-38/98 *Renault* [1999] ECR I-2973, in particular points 57 to 67, in which the Advocate General states that the concept of 'public policy' can embrace only fundamental principles and consequently a mistaken interpretation of the law by the first court does not permit the recognition of a foreign judgment to be regarded as contrary to public policy (by virtue of Article 27, point 1).

9 — I therefore share the view of the Advocate General on this point in the opinion delivered on 9 July 1987 in Case 145/86 *Hoffmann* [1988] ECR 645, p. 654, points 16 and 17, that 'clearly it is for the national courts alone to define the scope of public policy'.

determining whether certain provisions of national law form part of public policy, but at determining the limits within which the national court dealing with an application for the enforcement of a foreign judgment may dismiss the application on the ground provided for by Article 27, point 1, of the Convention.

To answer this question, it is necessary to begin with the Jenard Report, which states that the Convention 'seeks to facilitate as far as possible the free movement of judgments, and should be interpreted in this spirit', and that 'this liberal approach is evidenced ... by a reduction in the number of grounds which can operate to prevent the recognition and enforcement of judgments'. With regard to public policy, the Report adds that the wording of the public policy provision makes it clear that 'there are grounds for refusal, not of the foreign judgment itself, but if recognition of it is contrary to public policy'. It follows that 'it is no part of the duty of the court seised of the matter to give an opinion as to whether the foreign judgment is, or is not, compatible with the public policy of its country. Indeed, this might be taken as criticism of the judgment. Its duty is rather to verify whether recognition of the judgment would be contrary to public policy'. As the Court stated in the *Hoffmann* judgment of 1988, [10] it is clear from these extracts that the public policy clause must be construed restrictively.

26. With the second question, the referring court asks whether it is possible to regard as contrary to the (international) public policy of the State in which enforcement is sought the enforcement of a judgment given in criminal proceedings in which the defence presented by counsel for the defendant was not admitted by reason of his absence. As Article 27, point 1, constitutes an exception, the court of the State in which enforcement is sought may not, in connection with the recognition or enforcement of the foreign judgment, review the procedural rules of the State of origin and whether they accord with its own, any more than it may review whether they were correctly applied by the court which gave the judgment. Any such review would be contrary to the aims of the Convention, which consist precisely in facilitating the free movement of judgments and allowing the possibility of refusing an application for the recognition of judgments only in exceptional cases. Furthermore, it would be contrary to the main purpose of the uniform procedure for recognition and enforcement laid down by the Convention, which is to prevent the court of the State in which enforcement is sought from reconsidering the action brought in the State of origin. [11]

27. However, while the court may not review the procedural rules of the State of origin and whether they were correctly

10 — Cited above. In particular, in paragraph 21 the Court states that 'according to the scheme of the Convention, use of the public policy clause, which "ought to operate only in exceptional cases" (Jenard Report) is in any event precluded when, as here, the issue is whether a foreign judgment is compatible with a national judgment; the issue must be resolved on the basis of the specific provision under Article 27, point 3, which envisages cases in which the foreign judgment is irreconcilable with a judgment given in a dispute between the same parties in the State in which enforcement is sought'.

11 — Article 29 of the Convention provides that 'under no circumstances may the foreign judgment be reviewed as to its substance'.

applied, it must be allowed to decide that, in extreme cases of violation of fundamental rights of the parties that are recognised and guaranteed in the State in which enforcement is sought, the recognition or enforcement of the foreign judgment would be contrary to national public policy. However, only a serious and manifest breach could be relevant for this purpose. A review of all the restrictions, including minor ones, on the exercise of the parties' rights would amount to an assessment of the entire national procedure of the State where the judgment was given recognition and enforcement of which is sought.

To preclude such a possibility would amount to sacrificing national protection against serious breaches of basic rights to the obligation to ensure the free movement of judgments. In my opinion, it does not appear from the Convention that this obligation on the part of the same courts takes priority over safeguarding the fundamental principles of the national legal system. On the contrary, the grounds of refusal set out in Article 27 can all be reduced to subjective rights of the parties, mainly of a non-property nature, which the Convention specifically protects by giving them priority over the right to the recognition and enforcement of the foreign judgment. In particular, Article 27, point 2, is concerned with the right of defence of a defendant who fails to appear in person, point 3 relates to the effects on the parties of judgments given by a court and, finally, point 4 relates to subjective situations such as the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession (these fields are expressly excluded from the scope of the Convention by the first paragraph of Article 1).

There is no support for the Commission's view that the existence of a specific rule such as Article 27, point 2, on the right of defence of a defendant who fails to appear in person, a rule concerned with possible irregularities in the service of the document which instituted the proceedings, means that no other violations of that right or of other subjective rights of the parties can be relevant. On the contrary, as I have just said, this provision confirms that the rights of defence must be fully protected by the courts in all circumstances, including the enforcement and recognition of foreign judgments.

28. In the case at issue here, the defendant Mr Krombach, claimed that his right of defence was violated inasmuch as he was not allowed to present his defence in the proceedings before the French courts by reason of the rule of the French Code of Criminal Procedure which prohibits a defendant who fails to appear in person from being represented in court. The referring court observes that the right to be defended is a fundamental right enshrined in the European Convention for the Protec-

tion of Human Rights and Fundamental Freedoms [12] and expressly recognised in the German Basic Law. It concludes from this that the recognition of the French judgment would entail breach of a higher principle of law.

Since the right of defence is a fundamental right recognised in the European Convention on Human Rights and since in the present case the violation of this right is particularly serious in that the defendant had given notice of his intention to defend himself and the court of the State of origin refused his request in accordance with the national rules of procedure, I consider that the court of the State in which enforcement is sought must in any case guarantee full judicial protection of the right of defence. It follows that the latter court may dismiss an application for the enforcement of a judgment where the defendant who failed to appear in person was not allowed to present his defence. In other words, the recognition of such a judgment may constitute a breach of public policy within the meaning of Article 27, point 1, of the Convention.

— The applicability of Article II of the Protocol

29. The first paragraph of Article II of the Protocol provides that 'without prejudice to any more favourable provisions of national laws, persons domiciled in a Contracting State who are being prosecuted in the criminal courts of another Contracting State of which they are not nationals for an offence which was not intentionally committed may be defended by persons qualified to do so, even if they do not appear in person'. With this provision, therefore, the Convention grants persons domiciled in a Contracting State the right to be represented before the criminal courts of another Contracting State even if such a right is not recognised in the second State.

The second paragraph of Article II goes on to provide that 'however, the court seised of the matter may order appearance in person; in the case of failure to appear, a judgment given in the civil action without the person concerned having had the opportunity to arrange for his defence need not be recognised or enforced in the other Contracting States'. Consequently in States where a defendant who fails to appear in person is not allowed to present a defence, the courts may choose not to depart from the internal

12 — In the judgment of 23 November 1993 in Case 39/1992/384/462, *Poitrimol* v *France*, the European Court of Human Rights ruled that it was contrary to Article 6(1) and (3c) of the European Convention on the Protection of Human Rights and Fundamental Freedoms to prevent an accused person who failed to appear at the trial from presenting his defence. In particular, the Court stated that 'although not absolute, the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of a fair trial. A person charged with a criminal offence does not lose the benefit of this right merely on account of not being present at the trial ... . It is of capital importance that a defendant should appear, both because of his right to a hearing and because of the need to verify the accuracy of his statements and compare them with those of the victim — whose interests need to be protected — and of the witnesses. The legislature must accordingly be able to discourage unjustified absences. In the instant case, however, it is unnecessary to decide whether it is permissible in principle to punish such absences by ignoring the right to legal assistance, since at all events the suppression of that right was disproportionate in the circumstances. It deprived Mr Poitrimol, who was not entitled to apply to the Court of Appeal to set aside its judgment and rehear the case, of his only chance of having arguments of law and fact presented at second instance in respect of the charge against him' (paragraphs 34 and 35). See also the judgments of 22 September 1994 in Case 27/1993/422/501, *Pelladoah* v *Netherlands*, and of 21 January 1999 in Case 26103/95 *Van Geyseghem* v *Belgium*.

rules of procedure and may therefore order the accused to appear in person and refuse to admit a defence should he fail to do so. *However*, a judgment delivered in such proceedings need not be recognised or enforced in the other Contracting States.

30. This provision arises precisely from the differences between the rules on the subject in the various national legal systems. It offers a compromise only for unintentional offences and does not resolve conflicts which may arise where, in proceedings concerning intentional offences, the representatives of an accused who fails to appear in person are not allowed to defend him.

In the judgment in *Rinkau* [13] the Court, having been asked to give a ruling on the concept of an 'offence which was not intentionally committed' in Article II of the Protocol, held that it covers any offence 'the legal definition of which does not require, either expressly or as appears from the nature of the offence defined, the existence of intent on the part of the accused to commit the punishable act or omission'. The Court reached this conclusion on the basis of the premiss that the concept of an 'offence which was not intentionally committed' is 'an independent concept which must be explained by reference, first, to the objectives and scheme of the Convention'. However, the Court added that, 'in connection with the objectives of the Convention', the report on the Convention does say that the concept of an 'offence which was not intentionally committed includes road accidents'. Furthermore — and this is certainly the main criterion — 'by restricting the right to be defended without appearing in person, which is made available to persons who have committed certain offences, the Convention clearly seeks to deny that right to persons being prosecuted for offences which are sufficiently serious to justify its denial'. The Court went on to observe that in most of the Contracting States a distinction is made between offences committed intentionally and those not so committed, the latter being 'generally less serious in nature and ... covering most offences connected with road accidents which are to be ascribed to carelessness, negligence or the mere actual breach of a legal provision'.

If the provision were interpreted in such a way as to bring within its scope intentional offences, such as the manslaughter of which Mr Krombach was convicted, so as to allow the German court to refuse to enforce the French judgment on the basis of the second paragraph of Article II of the Protocol, it would amount to overturning the case-law and going back on the reasons which led to a restrictive interpretation of Article II.

On the contrary, I consider that the *Rinkau* judgment should be followed in full. As the Court observed, the Contracting States,

13 — Case 157/80 [1981] ECR 1391, in particular paragraphs 12 to 16.

aware of the differences between national rules of procedure concerning the right of defendants who do not appear in person to be represented in court, decided to lay down a uniform procedure only for unintentional offences, particularly those which are the cause of road accidents. The Contracting States made provision for an exception to this uniform procedure by giving the courts of a State in which recognition is sought the option of refusing to recognise a judgment given in derogation from the uniform rule. The States therefore deliberately excluded intentional offences from the application of the provisions in question.

31. However, as the German Government rightly observes, the fact that the Protocol does not lay down a 'uniform procedure' also for the exercise of the right of defence of persons prosecuted for intentional offences does not mean that the refusal by the courts of a State to grant a request by an accused who fails to appear in person to present his defence through counsel cannot be considered relevant for the purpose of applying Article 27, point 1, of the Convention. Although the second paragraph of Article II of the Protocol provides for the option of not recognising judgments given in derogation from the procedure referred to in the first paragraph, this has no bearing on the applicability of the ground of refusal in Article 27, point 1, of the Convention in the case of violation of the right of defence of a person prosecuted for intentional offences.

On the contrary, it confirms the interpretation of Article 27, point 1, given above in so far as it attaches specific importance to the right of defence of an accused who fails to appear in person and to the possibility of refusing to recognise or enforce foreign judgments where that right has been violated.

32. In the light of these observations, I consider that the reply to the second question should be that, on the basis of Articles 34 and 27, point 1, of the Convention, the enforcement of a judgment in civil proceedings awarding damages for harm caused by an intentional offence may be considered contrary to the public policy of the State in which enforcement is sought, if the court of the State in which the criminal proceedings took place refused to allow the accused person to be defended by counsel on the ground that the accused, who was domiciled in another Contracting State and was charged with the intentional offence, failed to appear in person.

The third question

33. With the third question, the referring court asks whether, if the replies to the first two questions are in the negative, the enforcement of a judgment given by a court which based its jurisdiction on exorbitant

rules and which refused to allow the accused to present his defence on the ground that he failed to appear in person, may be considered contrary to the public policy of the State in which enforcement is sought.

As I concluded, in replying to the second question, that an application for the enforcement of a foreign judgment given in breach of the right of defence of an accused who failed to appear in person may be refused under article 27, point 1, in conjunction with the second paragraph of Article 34 of the Convention, it is unnecessary to reply to the third question.

In any case, I consider that the fact that both the situations referred to in the first and second questions arise in the same case is irrelevant to the question of conflict between national rules of public policy. A violation of public policy is not assessed by reference to the *extent* of the differences between the legal system of the State of origin and that of the State in which enforcement is sought, but only by reference to the nature of the latter's rules and the seriousness of the violation.

Conclusion

34. In the light of the foregoing observations I propose that the Court reply as follows to the questions referred to it by the Bundesgerichtshof:

(1) Article 27, point 1, of the Brussels Convention, to which the second paragraph of Article 34 refers, must be interpreted as meaning that the enforcement of a judgment cannot be considered contrary to the public policy of the State in which enforcement is sought on the ground that the court of the

State in which the judgment was given gave judgment on a civil claim in criminal proceedings against a defendant domiciled abroad and based its jurisdiction solely on the victim's nationality.

(2) The same provision must also be interpreted as meaning that the enforcement of a judgment in civil proceedings awarding damages for harm caused by an intentional offence may be considered contrary to the public policy of the State in which enforcement is sought, within the meaning of Article 27, point 1, of the Convention, to which the second paragraph of Article 34 refers, if the court of the State in which the criminal proceedings took place refused to allow the accused person to be defended on the civil claim by counsel on the ground that the accused, who was domiciled in another Contracting State and was charged with the intentional offence, failed to appear in person.